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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOHN DIGGS, Defendant and Appellant.	B218766 (Los Angeles County Super. Ct. No. BA 355246)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Marcelita Haynes, Judge. Affirmed as modified.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon, Supervising Deputy Attorney General, and Sharlene A. Honnaka, Deputy Attorney General, for Plaintiff and Respondent.

SUMMARY

After his motion to suppress evidence was denied, defendant John Diggs pled no contest to a charge of possession of marijuana for sale, a felony, and was sentenced to two years in state prison. On appeal defendant contends that the trial court erred in denying his suppression motion and that he is entitled to additional presentence custody credits under Penal Code section 4019.

The trial court correctly denied defendant's suppression motion. However, under amendments to Penal Code section 4019 that we conclude are retroactive, defendant is entitled to 60 additional days of presentence local conduct credits, and we remand the cause to the trial court with directions to modify the abstract of judgment accordingly.

FACTS

Police officers Lyle Estanol and Jeff Kievit were on bicycles patrolling in the vicinity of Fifth Street between Wall and San Julian Streets in Los Angeles, "an extremely high narcotics area." They saw two men in close proximity to each other engaged in conversation: defendant, who was in a wheelchair, and Lonnie Smith. The two appeared to be looking at an object in Smith's hand, and Estanol heard the word "weed." Kievit heard defendant tell Smith, "I don't have anymore weed for you."

The officers approached the two men, and Smith suddenly turned and walked away. When Smith was six or seven feet away from defendant, he opened his left hand (the same hand that had held the object at which he and defendant had been looking) and "dropped some green plant-like material resembling marijuana onto the sidewalk." Estanol recovered the substance, which had the same odor and texture as marijuana, and placed Smith under arrest. At the same time, Kievit (according to Estanol) "detained the defendant for narcotics investigation for possible narcotics transaction" and searched defendant (after Estanol had examined the substance Smith had dropped). Kievit recovered "a large amount of marijuana"--more than an ounce--which was loose (not in a container or baggie) in a pocket of the jacket defendant was

wearing. Kievit also found $79 in small denominations ("loose and disheveled and crumbled") in defendant's pants pocket.

Defendant was charged by information with possession of marijuana for sale (Health & Saf. Code, § 11359), a felony. An amended information alleged defendant had suffered a prior conviction (Pen. Code, § 666 (petty theft after prior theft crime conviction)), for which he served a prison term, and that he did not remain free of prison custody (and sustained a felony conviction) during the five years subsequent to his prison term (Pen. Code, § 667.5, subd. (b)).

Defendant, representing himself, moved to suppress the evidence obtained from Kievit's warrantless search. (Pen. Code, § 1538.5.) Respondent presented Officer Estanol, who testified to most of the facts recited above. On cross-examination, defendant asked Officer Estanol what gave Estanol probable cause to arrest and search him. Estanol responded, "We recovered weed from your persons." The court explained that defendant was asking, "[O]n what basis did you detain him?" Estanol replied:

> "He [defendant] was having a conversation with Lonnie Smith. We heard the term 'weed' being used. And it was on--the defendant and Lonnie Smith were convers[ing] with each other. [¶] As Lonnie Smith walked away, he dropped green plant-like material resembling marijuana onto the sidewalk. [¶] I formed an opinion that a narcotics transaction had possibly taken place. So I detained both Lonnie Smith and defendant for a narcotics investigation."

Estanol testified that, when he dismounted from his bike, he ordered defendant to place his hands behind his back, but that defendant was detained, not arrested, at that time.[1] When defendant asked if Estanol thought defendant had a gun, Estanol answered, "In that area, it's a very high narcotics area. Weapons are commonly found

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[1] At the preliminary hearing, defendant asked Estanol, "What did you tell me when you, when you pulled up on the bicycle, what did you ask me?" Estanol replied, "I told you to place your hands behind your back."

on--on suspects." The court interjected, "That wasn't his question. [¶] Did you think he had a gun?" Estanol responded, "I--I was not sure, sir--I was not sure, ma'am."

After Estanol testified, the People rested as to the suppression motion, and defendant called Officer Kievit to testify. Defendant asked Kievit what aroused his suspicion that defendant and Smith were involved in a drug deal, and Kievit testified that he stopped his bike "when I heard you say 'I don't have anymore weed for you.' " Kievit (like Estanol) did not see any exchange of money or marijuana, but stopped "[b]ased on [defendant's] comment and based on that area is a--known as a high narcotics area. Particularly for marijuana."

The trial court denied the suppression motion, telling defendant that, had defendant not called Officer Kievit as a witness, "you probably would have been right. [¶] The fact that you were just looking at some weed and some man says " 'weed' "--I don't think that would have been enough to detain you. But you just put on a witness that says he heard 'I don't have anymore weed for you' which--believing that to be true, that gave him probable cause." Observing that "I don't believe [Officer Kievit's] lying," the court said that the words Kievit heard defendant say "is the part that gives them probable cause in my mind, not you just allegedly standing with someone who has weed in his hand." But "you added a missing piece yourself. 'I don't have anymore weed for you.' That's a whole different story."

Defendant accepted appointment of counsel, and entered a plea of no contest. On August 6, 2009, he was sentenced to the middle term of two years on the possession of marijuana for sale charge, and various orders were made and fines imposed that are not at issue in defendant's appeal. Defendant was also sentenced to two years concurrent on the probation violation resulting from his conviction. Defendant, who had been in custody since his arrest on April 10, 2009, received custody credits of 129 days, consisting of 87 days actual and 42 days good time/work time. The court granted respondent's motion to dismiss any remaining allegations under Penal Code section 1385.

Defendant filed this timely appeal, and later filed two motions with the trial court to correct presentence custody credits: the first for time actually spent in custody, and the second both for the actual time and for local conduct credits under amendments to Penal Code section 4019 that took effect after defendant was sentenced. The trial court granted the motion to correct the mistake in actual custody credits. The court denied the second motion as moot and did not address the request for additional local conduct credits.

DISCUSSION

1. The search

Defendant contends the search of his person was conducted without probable cause. We disagree.

A search conducted without a warrant, as in this case, is presumed illegal unless it comes within an exception to the general rule that warrantless searches are per se unreasonable. (*People v. Fay* (1986) 184 Cal.App.3d 882, 891.) A search incident to a lawful arrest is one of those exceptions, permitting the seizure of weapons and evidence on the arrestee's person or within his immediate reach; such a search is justified by the need to prevent the disappearance or destruction of evidence of a crime. (*Ibid.*) A search incident to an arrest may precede the arrest. (*People v. Ingle* (1960) 53 Cal.2d 407, 413.) "The crucial point is whether probable cause to arrest existed prior to the search . . . ." (*People v. Fay*, *supra*, at p. 892.) Probable cause has been generally defined as a state of facts that "would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime." (*People v. Ingle*, *supra*, at p. 412.) Probable cause is a "fluid concept--turning on the assessment of probabilities in particular factual contexts . . . ." (*Illinois v. Gates* (1983) 462 U.S. 213, 232.)

Another exception to the warrant requirement is a protective search for weapons incident to a lawful detention. (*People v. Medina* (2003) 110 Cal.App.4th 171, 176.) "In the case of the self-protective search for weapons, [the police officer] must be able to point to particular facts from which he reasonably inferred that the

individual was armed and dangerous." (*Sibron v. New York* (1968) 392 U.S. 40, 64; *People v. Medina, supra,* at p. 176.) A police officer conducting a pat down search "may not remove drug-related items whose tactile contours will not support such a threatening possibility [objects that might be weapons]." (*People v. Fay, supra*, 184 Cal.App.3d at p. 891.)

Defendant, pointing to Estanol's testimony that Estanol "detained . . . defendant for a narcotics investigation," contends the search was illegal because no facts showed it was conducted for safety purposes. And, defendant continues, if the court's finding of probable cause was based on sufficient cause to arrest, it was "clearly erroneous" because defendant's statement to Smith that he did *not* have any more marijuana for him "surely cannot be found sufficient to support a finding of probable cause for arrest."

Respondent does not attempt to validate the search as a protective search for weapons, and could not do so; there was no evidence the officers feared the presence of a weapon, and even if there were, the "tactile contours" of loose marijuana could not have "reasonably convey[ed] a connotation of danger." (*People v. Fay, supra,* 184 Cal.App.3d at p. 891.) The only issue is whether probable cause to arrest defendant existed before the search. We agree with respondent that it did.[2]

Defendant and Smith were talking and looking at an object in Smith's hand in "a very high narcotics area." Officer Kievit heard defendant tell Smith, "I don't have anymore weed for you" and, immediately upon seeing the police officers, Smith walked away and dropped marijuana on the sidewalk (from the same hand in which he

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[2] Defendant's reliance on Estanol's testimony that defendant was not under arrest when he was searched does not assist him. The police may search before or after an arrest, so long as there is probable cause for the arrest. (*People v. Fay, supra,* 184 Cal.App.3d at pp. 891-892.) Moreover, it is the facts known to the officer that determine probable cause; an officer's legal conclusion drawn from facts known to him is not binding on a court. (*People v. Adams* (1985) 175 Cal.App.3d 855, 862-863 ["[w]e see no reason why a court cannot find probable cause, based on facts known to the officer, despite the officer's judgment none existed"].)

held the object at which he and defendant had been looking). When the police ascertained that the object Smith dropped looked and smelled like marijuana, they had probable cause to arrest the defendant based on the statement he had made to Smith. Defendant's argument that probable cause did not exist because his statement was that he did *not* have "any more weed" for Smith is singularly unpersuasive, as that could well mean "any more weed" than he had just sold to Smith. (See *People v. Fay*, *supra*, 184 Cal.App.3d at p. 892 [" '[i]n dealing with probable cause . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act' "].)

In sum, because there was probable cause to arrest defendant before he was searched, the trial court properly denied defendant's suppression motion.

2. Defendant's conduct credits

Defendant contends he is entitled to additional presentence conduct credits under amendments to Penal Code section 4019 that became effective while defendant's appeal was pending. We agree with defendant that the amended statute should be given retroactive effect.

To summarize: Penal Code section 4019 was amended effective January 25, 2010 (the January 2010 amendment). (Former Pen. Code, § 4019, as amended by Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.) (The statute was amended again effective September 28, 2010, but the new amendments apply to prisoners confined for crimes committed on or after that date.) (Pen. Code, § 4019, subd. (g).) The January 2010 amendment resulted in an increase in the number of presentence good conduct and work time credits to be awarded to certain classes of offenders as an offset against a prison sentence. As applicable to defendant, under the statute in effect before the January 2010 amendment, a term of six days would be deemed to have been served for every four days spent in actual custody, giving defendant "a total of two days of conduct credit for every four-day period of incarceration . . . ." (*People v. Dieck* (2009) 46 Cal.4th 934, 939.) Under the January 2010 amendment, "a term of four days will be deemed to have been served for every two days spent in actual custody"

(former § 4019, subd. (f)), giving defendant two days of conduct credit for every two days in custody.

There is a split of authority among our appellate districts on the retroactivity of the January 2010 amendment to section 4019 (and the issue is now on review before the Supreme Court). This division has joined the courts holding that retroactive application is dictated.[3] Briefly stated, when the Legislature enacted the January 2010 amendment, it did not expressly declare whether or not the amendment should be given retroactive effect. Penal Code section 3 provides that no part of the code is retroactive unless expressly declared to be so. Nevertheless, it is also well established that a criminal defendant, absent a saving clause, "is entitled to the benefit of a more recent statute which mitigates the punishment for the offense . . . ." (*People v. Babylon* (1985) 39 Cal.3d 719, 725.) And, "[i]f the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then . . . it, and not the old statute in effect when the prohibited act was committed, applies." (*In re Estrada* (1965) 63 Cal.2d 740, 744.)

Consequently, and in accordance with the reasoning in the majority of published decisions on the issue, we conclude the January 2010 amendment to section 4019 should be applied retroactively to cases not yet final as of the date of its enactment. Here, defendant was in presentence custody for 119 days. He was awarded 58 days of local conduct credits under the former statute (two days for every four days spent in actual custody), but under the January 2010 amendment he is entitled to 118 days (two days for every two days spent in actual custody).

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3 See *People v. Bacon* (2010) 186 Cal.App.4th 333 [2d Dist., Div. 8], review granted Oct. 13, 2010, S184782; see also, e.g., *People v. Keating* (2010) 185 Cal.App.4th 364 [2d Dist., Div. 7], review granted Sept. 22, 2010, S184354; *People v. Pelayo* (2010) 184 Cal.App.4th 481 [1st Dist., Div. 5], review granted July 21, 2010, S183552; but see, e.g., *People v. Hopkins* (2010) 184 Cal.App.4th 615 [6th Dist.], review granted July 28, 2010, S183724.

DISPOSITION

The cause is remanded to the trial court with directions to prepare an amended abstract of judgment reflecting total presentence custody credits of 237 days, consisting of 119 days of actual custody credits and 118 days of good time/work time credits, and to transmit a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

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GRIMES, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.